No. 12,006

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH ORBY SMITH, JR., and WILLIAM JOSEPH MONTEZ,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLEE.

JAMES M. CARTER,
United States Attorney,

NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief, Criminal Division,

CAMERON L. LILLIE,
Assistant U. S. Attorney,

600 United States Postoffice and
Courthouse Building, Los Angeles 12,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 12,006

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH ORBY SMITH, JR., and WILLIAM JOSEPH MONTEZ,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF FOR APPELLEE.

I.
Jurisdictional Statement.

There is no jurisdictional statement contained in appellants' opening brief. Therefore, we respectfully point out that defendants and appellants herein were convicted by a jury in the United States District Court for the Southern District of California for the violation of section 588(b), subsection (b), Title 12, United States Code; the District Court allegedly had jurisdiction under section 41(2) of the United States Code, and this court has jurisdiction under section 225(a) of Title 28, United States Code. [Indictment, Clk. Tr. R. 2; Verdict, Clk. Tr. R. 10 and 11; and Judgments, Clk. Tr. R. 12 and 14.]

The appellant Smith was sentenced to a term of imprisonment of 25 years [Clk. Tr. R. 14]. The appellant Montez was sentenced to a term of 20 years [Clk. Tr. R. 12]. Thereafter, the appellants Smith and Montez duly filed their notice of appeal from said judgment within the time prescribed by law [Clk. Tr. R. 26].

II.

Statement of the Case.

The indictment of the Federal Grand Jury upon which defendants were convicted charges them as follows:

> "On or about December 4, 1947, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Joseph Orby Smith, Jr., did, by force and violence and by putting in fear, feloniously take and attempt to take from the person and presence of another namely, Paul V. Glowczewski, money belonging to, and in the care, custody, control, management and possession of a bank, namely: the Seventh and Broadway Branch of the Bank of America, National Trust and Savings Association, which Bank was then a member bank of the Federal Reserve System:
>
> "In committing and attempting to commit the offense heretofore charged, defendant Joseph Orby Smith, Jr., did assault Paul V. Glowczewski and put in jeopardy the life of said Paul V. Glowczewski by the use of a dangerous weapon and device, namely; a .45 caliber automatic.
>
> "The Grand Jury further charges that on or about December 4, 1947, in Los Angeles County, California, within the Central Division of the Southern District of California, Defendant William Joseph Montez did aid and abet the defendant Joseph Orby Smith Jr., in the commission of said offense." [Clk. Tr. R. 2 and 3.]

III.
Statement of Facts.

It is obvious from the reading of the appellants' opening brief that no effort has been made to set out a complete statement of facts adduced at the trial. We deem such a statement necessary to show this honorable court, first, that the substantial evidence is inconsistent with innocence and in no sense can be construed as being as consistent with innocence as with guilt; second, that evidence tending to prove other offenses was invited by the appellants and properly admitted; and third, that no objection was made at the time the evidence was admitted and in the absence of such an objection appellants cannot now complain, because even if improperly admitted the facts so without doubt support conviction that any such error could not properly be prejudicial to appellants.

Additional facts adduced at the trial are as follows:

On December 4, 1947, the Bank of America, Broadway and Seventh Street Branch, in the City of Los Angeles, was held up at approximately 3 P. M. [R. 8, 9 and 76] and the amount of money obtained by the holdup man was the sum of $2,990.00 [R. 42] in denominations of 5, 10, 20, 50 and 100-dollar bills [R. 11]. Appellant Smith was identified as the robber by the teller, Glowczewski [R. 9] and by two persons standing in line behind him at the time the bank was held up, Susan Bloom [R. 58] and Esther Martens [R. 79 and 81]. The three identifying witnesses testified that the defendant had on a beige colored raincoat [Government's Exhibit 2] which was dirty and soiled and that he wore no hat [R. 12, 60, 61 and 78], and that he needed a haircut and a shave [R. 26, 60, 61 and 78]. The

teller identified the gun [Government's Exhibit 3] used by the robber as a .45 automatic [R. 15] the muzzle of the gun was rusty, with rust marks along the left side of the barrel [R. 16].

Appellants Smith and Montez both admitted in their testimony at the time of the trial that they were in the vicinity of the bank between the hours of 1:30 [R. 224, 225, 301] and some little time after the holdup had occurred [R. 228, 309, 310 and 311], and had during that period been to an attorney's office in the immediate vicinity of the bank where they saw a man named John R. Jobe, employed by the attorney [R. 225, 226 and 304]. John R. Jobe, a Government witness, corroborated the testimony of the appellants that they came to the attorney's office on December 4 [R. 123] but placed their arrival between 3:10 and 3:20 P. M. of that day, which was shortly after the holdup [R. 124]. Jobe further testified that Smith, whom he knew as "Corie", on that day looked like he needed a haircut and shave [R. 125 and 129].

Earl Patrick, another Government witness, testified that he knew Smith and Montez [R. 43] but he knew Smith under the name of "Corie"; that he saw him about 7:30 or 8 o'clock in the afternoon of December 4th at the home of Henry Royal [R. 44] at 43rd and Crocker Streets; that Corie was sitting on a couch and Montez in a chair; that Corie showed him some money in denominations of fives, tens, and some twenties and $100 bills and that he had a conversation with him in respect to the money [R. 45]; that in the conversation Smith told him he had to have more money and that he had about $3,000.00 [R. 46]. He further testified that he saw Montez take a .45 automatic and put it under the cushion where he sat; and that the gun was similar to Government's Exhibit 3 [R. 47].

Howard L. Smith, a Government witness, testified that he was an officer of the Los Angeles Police Department, that he placed the defendant Montez under arrest on December 8, 1947, at 1139 North Cummings [R. 82]; that at about 11 o'clock at night he walked into the bedroom where Montez was in bed; and after Montez got out of the bed the mattress was raised and that two guns were found —one a .45 automatic [Government's Exhibit 3] and the other a .32 automatic [R. 83]; that at that time the .45 automatic had the number filed off, there was a pattern of rust on the left side of the barrel where the pit marks are, and there was rust in the barrel of the gun, in the muzzle [R. 84]; and that the gun was loaded; that the gun was turned in to the Police Crime Laboratory [R. 85]; that about two months subsequent to December 8, 1947, he again went out to the home of Montez in the company of Special Agent Hutcheson where they found Government's Exhibit 2, the raincoat, in a clothes closet in the back bedroom of Montez's home [R. 86].

Russell Camp, a Government witness, testified that he is a police officer of the City of Los Angeles and was attached to the Crime Laboratory. He recognized Government's Exhibit 3 as a gun he saw on December 10, 1947, in the Crime Laboratory of the Los Angeles Police Department which had been brought in for restoring of the number and for test firing; that in raising the numbers and test-firing the gun an acid was used; that the gun was washed and wiped off with an oily rag, and that the effect of such a cleaning process removes the loose rust. The left side of Government's Exhibit 3 had rust pit marks still apparent upon it [R. 92, 93 and 94].

Special Agent Hutcheson of the Federal Bureau of Investigation testified on behalf of the Government that he

had a conversation on January 8, 1948, with Montez [R. 97] when Montez was shown a picture of Smith and denied knowing Smith and stated he had never seen him before and had never had contact with him [R. 99]; that he had a subsequent conversation with Montez on January 12, 1948, in which Montez admitted ownership of Government's Exhibit 2, the coat, and Government's Exhibit 3, the gun [R. 100]; that Montez further stated to him at this interview that on December 4, 1947, at 1 o'clock P. M. he, Montez, had driven downtown from his home and parked his car in downtown Los Angeles on Broadway between 8th and 9th Streets; that he attended a movie at the Tower Theater, that he was all by himself and met nobody he knew [R. 101].

Both of the appellants admitted in their testimony at the time of the trial being in the vicinity of the bank at the time of the robbery [R. 224, 225, 301 and 302]; and each testified that they arrived in the downtown area at approximately 1:30 P. M. [R. 225, 301] and that they arrived at the attorney's office at 2 or 2:30 P. M. [R. 303 and 305] and left the office, and that after leaving the office they noticed a big crowd out in front of the bank [R. 227, 228 and 309]. Smith testified that he arrived home at 5:30 or a quarter to 6 [R. 229] and thereafter went on a date around 7 o'clock with one, Jack Arbuckle [R. 230]. Montez testified that he arrived home around 5 o'clock after leaving the downtown area [R. 312] and stayed home [R. 313].

Other testimony relating to the commission by the defendants of other similar offenses is omitted at this point because it will be more fully set out and dealt with later in this brief.

IV.
ARGUMENT.

I. All Substantial Evidence Clearly and Without Doubt Supports Conviction and Is in No Sense as Consistent With Innocence as With Guilt.

Appellants have failed in their argument in Point I to point out on what specific evidence they rely to invoke the well-established rule that when all substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a conviction. We agree with the principle but cannot see the application at the case at bar. The well-established rule quoted above is qualified in the cases cited by appellants in that if the evidence is convincing that the defendants are guilty then there is no reason ordinarily for the court to exercise such powers.

The evidence is corroborated, plain and convincing of the defendants' guilt. It discloses that the appellant Smith was positively identified as the holdup man by three persons—the teller [R. 9] and two disinterested witnesses who were standing in line in back of the holdup man, Bloom [R. 58] and Martens [R. 79 and 81]. Not only did they identify the person of Smith but the coat which was worn by him at the time [R. 12, 13, 61 and 76] and the gun used in the holdup [R. 15, 16, 47 and 65], and they attested to the further fact that Smith needed a haircut and a shave [R. 26, 41, 60, 61 and 78]. It is to be noted that the witness Bloom picked Smith out of a police show-up on the second occasion of seeing him [R. 60, 62] and prior to picking Smith out of a line of suspects in the show-up she picked the defendant's picture out of a dozen or two photographs [R. 65 and 66]. The teller was very careful in his identification and would not positively identify ap-

pellant Smith until he saw him under similar lighting conditions as prevailed at the time of the holdup [R. 19, 20, 36 and 41].

Both appellants, Smith and Montez, admitted being in the vicinity of the bank at the time of the holdup and stated they were in the Story Building located at 610 South Broadway [R. 114] where they saw the Government witness Jobe [R. 123, 225, 226 and 304]. Jobe, the Government witness, however, placed their arrival in the office building at 3:10 or 3:20 P. M. [R. 124] and Jobe further corroborated the identifying witnesses' testimony that appellant Smith wore no hat and needed a shave and a haircut [R. 125 and 129].

The coat [R. 12, 13, 61 and 76] and gun [R. 15, 16, 47, 65] used by Smith in the holdup were identified as the same coat and gun subsequently found in Montez's possession [R. 83, 84, 86, 87, 94] and admittedly in Montez's possession on December 4, 1947 [R. 87, 101, 112, 113]. The amount of money obtained by the holdup man at the time of the robbery was $2,990.00 [R. 42] in denominations of 5, 10, 20, 50 and 100-dollar bills [R. 11]. The Government witness Patrick testified that he saw Smith and Montez at about 7:30 or 8 o'clock on December 4th subsequent to the holdup at the home of Henry Royal [R. 44] where Smith showed him some money in denominations of 5, 10, 20 and 100-dollar bills [R. 45], stating that he had to have more money and that he had about $3,000.00 [R. 46]; and, further, that Montez at that time had in his possession a .45 automatic similar to the one used in the holdup [R. 47].

The testimony of the appellants is much in doubt and is hard to believe. Appellant Montez in two interviews with

Special Agent Hutcheson of the Federal Bureau of Investigation denied knowing Smith when shown a picture of Smith, and stated that he had never seen him before [R. 99]; and further stated that on December 4, 1947, at 1 P. M. he had driven down town from his home and parked his car in downtown Los Angeles where he had attended a picture show and *that he was all by himself and met nobody he knew* [R. 101]. At the time of the trial appellant Montez testified that he did know Smith and had first met him on December 2, 1947 [R. 294]; that on the day in question, December 4, he arranged to meet Smith at Sunset and Hollywood Boulevard [R. 300] and drove with Smith downtown, arriving at about 1:30 to a quarter of two [R. 301], where they then proceeded to Fischer's office, arriving at about 2 o'clock [R. 303] where they saw Mr. Jobe [R. 304].

Appellant Smith on cross-examination testified that he made a statement in Chicago to the Federal Bureau of Investigation [Government's Exhibit 5]; that each page of the statement had been read by him and signed and that everything contained therein was true [R. 253, 254, 255]; that at the time the statement was taken he had stated, "I slept late that morning, had breakfast about 11 o'clock and about 3 P. M. of that day I went down to see Mr. Jobe who was a bail bondsman employed by Fischer and Fischer, lawyers. The purpose of my visit to Mr. Jobe was to find out whether or not he could fix up my failure to report to the Parole Board agent in Illinois. I was discussing the parole matter with Mr. Jobe for some hour and a half or two hours and probably left his office with him about 4:45 P. M. Mr. Jobe's office is located in the Broadway Building, 625 Broadway, Los Angeles" [R. 258

and 259]. Prior to being shown Government's Exhibit 5, appellant Smith had testified, on both direct and cross-examination that on December 4th he was in the downtown district of Los Angeles at about 1:30 and went immediately to the Story Building and into the office where they saw Jobe which was about 1:45 P. M. of that day [R. 224, 225, 226 and 257].

Construing the evidence as favorably as possible to the appellants, still it cannot be said that all or any of the substantial evidence could reasonably be consistent with the defendants' innocence.

II. Admission of Evidence Tending to Prove Other Offense Not Error.

In answering this point it is necessary first to include a discussion of Appellants' Point IV that "THE APPELLATE COURT MAY NOTICE SERIOUS ERROR WHICH WAS PLAINLY PREJUDICIAL, ALTHOUGH NOT BROUGHT TO THE ATTENTION OF THE TRIAL COURT," because a reading of the Reporter's Transcript shows that at no time was an objection made by the defendants to any of the testimony relating to another offense, and now for the first time complained of an Appeal in their Point II, pages 7, 8 and 9, of their Opening Brief.

It cannot be denied that Appellants made no objection at the time of the trial to the admission of the evidence now complained of, nor was any motion to strike the evidence admitted made thereafter. The testimony complained of was that of Mr. Jobe [R. 148], which was merely cor-

roborative of Mr. Patrick's testimony [R. 49 and 50] establishing the facts of another similar offense committed by defendants. This testimony was elicited upon cross-examination of a Government witness by defense attorneys themselves.

It is well-settled law that allegedly objectionable matters in criminal prosecution not properly objected to in the trial court may not be considered on appeal.

Matheson v. United States, 227 U. S. 540, 1913;

Alberty v. United States, 91 F. 2d 461, 1937, C. C. A. 9;

Joseph v. United States, 145 F. 2d 74, 1944, C. C. A. 9, cert. den. 323 U. S. 776.

However, it is true that there exists an exception to this general rule in cases involving life and liberty, but only in cases in which the alleged error would seriously affect the fairness, integrity or public reputation of judicial proceedings,

Johnson v. United States, 318 U. S. 189;

United States v. Socony-Vacuum Oil Co., 310 U. S. 150.

or in cases where the alleged error results in a *manifest miscarriage of justice,* taking into consideration the testimony supporting the conviction of the defendant.

Moore v. United States, 161 F. 2d 932, cert. den. 331 U. S. 857;

Giles v. United States, 144 F. 2d 860, C. C. A. 9.

It is the law of this Circuit that the Appellate Court can look into the record far enough to see whether or not there has been a miscarriage of justice, or whether there is testimony tending to support the verdict.

> *Sherwin v. United States,* 112 F. 2d 503, 312 U. S. 654 (in which the Supreme Court instructed the Appellate Court to consider the sufficiency of the evidence to sustain the verdict in the absence of an objection or exception);
>
> *Bailey v. United States,* 13 F. 2d 325, C. C. A. 9;
>
> *Marco v. United States,* 26 F. 2d 315, C. C. A. 9;
>
> *Giles v. United States, supra.*

If an examination of the record with reference to an assigned claim of error to which no objection has been made in the District Court discloses no miscarriage of justice, then the Court will not consider such alleged error further. Furthermore, where the record shows that the evidence without doubt sustains the verdict and that the conviction of the defendants is clearly supported by the evidence, the alleged error cannot be prejudicial because no harm could have been done to the defendants and no miscarriage of justice could possibly result where there is a clear showing of guilt.

The case of *Smith v. United States* (267 Fed. 666, C. C. A. 8, 1920), clearly bears this out, at page 667:

> "If it appears from the entire record that the accused is clearly guilty, errors not excepted to will afford no ground for reversal * * *." (Citing *Williams v. U. S.,* 265 Fed. 625.)

See also *Moore v. United States,* 161 F. 2d 932, C. C. A. 5, 1947, at page 933:

> "It may not be doubted that while normally a defendant may not claim a reversal except for error duly saved and assigned, this court has the power to reverse, notwithstanding no objection was made and no exception taken, where justice requires. * * * But this does not mean that the appellate court will retry the case as a jury would and determine the guilt or innocence of the defendant for itself. 'We are not triers of fact.' Hargrove v. United States, 5 Cir., 139 F. 2d 1014. When a defendant is convicted, as appellant here was, on a fair charge and on a trial containing no objections or exceptions to its course and conduct, only the strongest kind of showing that justice has miscarried will avail him. The record is brief, the testimony in what was said and done and in its implications is clear, simple and direct, and it certainly cannot be said that it was a manifest miscarriage of justice to convict upon its showing."

We respectfully submit that there cannot be a miscarriage of justice in the convictions of the appellants because of the clear showing of their guilt from the record. The alleged error could not be prejudicial to the rights of the defendant in a case in which it appears from the record that the accused were clearly guilty.

From a reading of the evidence at bar, excluding all of the testimony now for the first time objected to relating to another offense, it is clear that the guilt of the defendants was established without any doubt.

It is obvious that had the evidence admitted and now complained of been properly and timely objected to, or in lieu thereof a motion to strike the testimony been made, and

had the court sustained the objection or motion, the conviction of the defendants would be clearly supported. We do not believe that any error was committed by the trial court in admitting evidence of another offense. But if, for the sake of argument, error had been committed, how then can it be said that such error was prejudicial to the rights of the defendants in view of the uncontradicted and corroborative evidence that a robbery of the Bank of America had been committed, wherein the defendant Smith was definitely identified by three witnesses to having been the person who committed it, with the defendant Montez in the vicinity of the bank at the time of the commission of the robbery, with the gun and coat used in the robbery by Smith identified, and both articles later recovered in Montez's possession? Further, the evidence discloses that on the evening of the robbery Smith, in the presence of Montez, admitted having $3,000.00 and showed the denominations of bills to a witness which was equal to the amount obtained in the robbery, and wherein Montez was seen at the same time in possession of the same or a similar gun identified as being used in the holdup. In view of this evidence, how much more damage to the defendants could have been done by the evidence actually invoked by their attorney that the defendants and one of their witnessed robbed another person by force on the morning of December 5, 1947, than was already done by the clear and convincing proof that these defendants robbed the Bank of America on December 4, 1947?

There might be some merit to defendants' contention that the admission of such evidence was prejudicial had the Government's case against them been built up solely on circumstantial evidence, but here the robber Smith was

identified by three witnesses. The defendants were placed in the vicinity of the bank by another witness at the time of the holdup, and the gun and coat used by Smith was admittedly in the possession of Montez after the robbery and were identified as the articles used by Smith. It is contended that no such argument can fairly be made.

Arguing the actual merits of appellants' Point II, that the admission of testimony of another offense was reversible error, the Government respectfully urges the following:

(A) That Defendants Invited Admission of the Evidence Now Objected to and Are Not Now in a Position to Complain.

(B) That Proof of the Commission of a Like Offense Near the Same Time Was Proper.

(A) IF ERROR WAS COMMITTED IN THE ADMISSION OF THE EVIDENCE OF OTHER OFFENSES DEFENDANTS NOT ONLY FAILED TO PROPERLY AND TIMELY OBJECT TO IT, BUT ACTUALLY INVITED IT WITHOUT EXERCISING THE RIGHT TO STRIKE IT.

Curiously enough, the testimony of another robbery by defendants was elicited through the defendants' cross-examination of a Government witness, Patrick.

It is a well-established rule of law that counsel cannot complain of being prejudiced by a situation which he himself created,

Laney v. United States, 294 Fed. 412, App. D. C. 1923,

and cannot complain of error invited by himself.

Shields v. United States, 17 F. 2d 66, rev. 273 U. S. 583, C. C. A. Pa. 1927.

This general principle of estoppel forcefully applies to the admission of evidence.

Proffitt v. United States, 264 Fed. 299, C. C. A. 9, 1920;

Robinson v. United States, 33 F. 2d 238, C. C. A. 9.

The courts are uniform in not permitting an accused to elect to pursue one course at trial and then when that has proven to be unprofitable to insist on appeal that a course which he rejected at the trial be reopened to him.

Johnson v. United States, 318 U. S. 189.

In the case at bar the testimony not objected to in the trial court and complained of now was elicited by defendants' attorney on cross-examination of a Government witness and further gone into by the Government attorney on redirect examination of those same witnesses. Defendants certainly are not entitled to complain of redirect examination affecting other offenses, after having first brought out the matter on cross-examination. A case directly in point is *Cusmano v. United States,* 13 F. 2d 451, cert. den. 273 U. S. 773. In this case defendant was being tried for possessing with intent to use property stolen from interstate commerce. The Government put on the stand one of their witnesses, Louisignan, an express company employee. On cross-examination defendant's counsel brought out of him the testimony that he had delivered to the defendant other stolen packages than the one involved. The Court held that defendant was not entitled to complain of redirect

examination affecting such matter. Said the court at page 452:

> "There are two reasons why the error is not available to the defendant. The first is that no exception was reserved to the ruling of the court; and the second, more compelling, that this evidence was first brought out on cross-examination by defendant's counsel, who inquired of the witness, in detail as to the number of packages delivered to defendant and his associate."

See also the related cases of

Hood v. United States, 14 F. 2d 925, cert. den. 273 U. S. 765;

McBoyle v. United States, 43 F. 2d 273, rev. 283 U. S. 25;

which further set out the principle that a defendant cannot complain of admissions of evidence elicited by his own counsel nor can he complain that the Government on cross-examination inquired into matters which his own counsel first injected into the case.

The following recital of the evidence here complained of will show without doubt that if error was committed in admitting it, that it was invited by counsel who is now estopped to complain and that the case at bar is identical with that of *Cusmano v. United States, supra.*

Patrick testified, on cross-examination by defendants' counsel [R. 48, 49 and 50]:

> "Q. What were you doing on the morning of the 5th of December? A. On the morning of the 5th?
>
> Q. Two days before. A. Two days before the 5th?

The Court: Two days before the 7th. A. Two days before the 7th. Do you mean what special thing I was doing that morning?

Q. By Mr. Freutel: Anything out of the ordinary, yes. A. Yes, it was.

Q. Relate it to the court and jury. A. I brought my car out to the City of Compton.

Q. And what did you do? A. Do you mean what did I do?

Q. After that when you got to Compton.

The Court: Is that what you did when you got arrested? A. No, sir, I drove my car to Compton and parked at a place where I was told to park it by Mr. Royal.

Q. By Mr. Freutel: Was he the man whose name you related here before? A. Yes, sir.

Q. Do you know what purpose Mr. Royal had in asking you to do that? A. Yes, I do.

Q. Tell the court and jury. A. It was to show me—to show me how some of the men would operate in the matter of robbing a person.

Q. This was after the occurrence of the robbery for which you were arrested? A. Yes, it was.

Q. Had you engaged in such educational expeditions with Mr. Royal before? A. No, I hadn't.

Q. Did you see the defendant Smith on the 5th day of December? A. Yes, I did.

Q. Under what circumstances? A. I do not understand you.

Q. What was he doing? A. He was parked in a car down from me where I was parked.

The Court: In Compton? A. In Compton.

Q. By Mr. Freutel: While this briefing was going on after the robbery? A. Yes.

Q. Was the planned robbery ever carried into commisison—ever carried out? A. Yes, it was.

Q. That was on the next day? A. No, I believe that was on the 5th.

Q. You planned it in the morning and you carried it out the same day? A. The same day.

The Court: What was it? A bank robbery? A. No, it was a man that owned a check-cashing agency.

Q. By Mr. Freutel: Was the defendant Smith armed at that time? A. Yes, he was.

Q. What was he armed with? A. A .38 police revolver, I believe, a pistol.

On redirect examination of Patrick by the Government, in response to his testimony on cross-examination, only one question was asked of Patrick [R. 56]:

"Q. You went out on this job on Compton Avenue on the morning of the 5th. You testified on cross-examination, Mr. Patrick, that it was a holdup and that Smith went with you in another car, is that correct? A. That is correct.

Q. Did the defendant Montez go out on that job? A. Yes, he did."

The record therefore discloses that the introduction of evidence into the record of another offense was brought in on cross-examination of a Government witness by the defense and no motion to strike after the testimony was admitted was made on the part of the defendants.

The testimony now objected to by the defendants was elicited by the Government on a redirect examination after cross-examination of the witness Jobe by defendants' attorney, and that this evidence which was brought out on redirect examination of Mr. Jobe was merely corroborative

of the testimony of Patrick and no objection to it nor any motion to strike was made by defendants' counsel. On cross-examination of the witness Jobe [R. 130, 131]:

> "Q. Do you recall discussing your daughter with Corie and Montez? A. Discussing my daughter with them?
>
> Q. Just saying you had seen her recently and she was working at a certain— A. That is right, I did that.
>
> Q. That was on the 4th? A. I don't remember what date that was. I could have been the first of second or the third meeting. My daughter was working at El Rancho, 738 West Seventh Street.
>
> Q. The third meeting— A. The first, second, or third.
>
> Q. When was the third meeting? A. It was either at 612 East Twenty-third Street or it might have been at Seventh and Broadway, when I met him at 925 West Seventh. I don't remember when the incident was; I remember discussing my daughter with the two boys."

On redirect examination, Government's counsel then asked the witness Jobe [R. 147, 148, 149]:

> "Q. Did you have a conversation with Corie and Montez on East Twenty-fourth Street? A. Yes, sir, I did, sir.
>
> Q. Can you tell the jury what was the substance of the conversation?
>
> Mr. Avery: Will you fix it, as to time?
>
> Mr. Lillie: Pardon me.
>
> Q. By Mr. Lillie: Approximately what date was it, do you know? A. Oh, I believe, sir, if my memory serves me right, that was around December 5th. I

wouldn't want to be confident. I believe it was a day or two days after that bank robbery, or something.

Q. Was it at night or in the daytime? A. It was in the morning, sir.

Q. What time in the morning, approximately? A. I would say approximately 9:30 in the morning.

Q. There was just yourself, Montez, and Corie there? A. That is right, where we were talking. Other people in the house, but only those three where we were talking, sir.

Q. What was your conversation? A. Well, sir, I had—I think I had 60 or 70 cents laying out on the table there, and they were kidding me. Montez reached over and picked up the change, and I said, 'Wait a minute. Don't take my cigarette money.'

So he said—he took some more money and threw it out on the table. He said, 'I would leave you some more, but that is all I got, Mr. Jobe.' He said, 'We' —I don't know; they had done something and they didn't make no money; four of them, only seven and a half apiece, or seven—$28.00 split four ways was $7.00, and that was all they had.

Q. What was this 'something' they did? A. Robbed somebody; robbed somebody. Knocked some old man in the head with a pistol and robbed some collector or something. I don't know what it was.

Mr. Avery: Objected to, unless he is relating a conversation with one of the defendants.

The Court: Yes, that is correct. Is this what they stated to you?

The Witness: Yes.

The Court: The jury is instructed to disregard what the witness previously stated.

What did they tell you?

> The Witness: They told me they went out and got a tip on some man going to the bank. His wife was walking four or five steps behind him, or some other thing, and Bill Montez told me Corie was crazy, said Corie hit this old man over the head with a pistol and the man went down, and Bill Montez said, 'The bullet barely hit my head. He almost killed me.' "

It is obvious that it was only after the incident of the conversation was brought out on cross-examination that on redirect the witness Jobe testified that another offense had been committed by the defendants; that no objection was made to the testimony except the objection made by Mr. Avery [R. 149], wherein he stated:

> "Objected to, unless he is relating a conversation with one of the defendants."

The court then said: "Is this what they stated to you?", and the witness answered "Yes." Thereafter, the witness testified to the other offense committed by the defendants which was merely corroborative of the testimony of Patrick, with no objection made to the production of the testimony nor any motion to strike made after it was given.

In the appellants' appeal brief and the points upon which they rely, no objection is made to the testimony of Patrick, from whom was illicited on cross-examination by defendants' counsel the first facts of another offense committed by the defendants. No more prejudice to the defendants could accrue, if any accrued by Jobe's corroboration of Patrick's testimony than was already in the record and if this caused any prejudice to defendants rightly or wrongly defendants are responsible for it. They them-

selves invited the testimony in the first instance on the cross-examination of Patrick. How then can defendants claim unfair surprise and embarrassment? The evidence was originally introduced by the cross-examination of the defendants' counsel of the witness Patrick, and they now claim that the invited testimony was improperly admitted.

It is significant that no error was committed by the court nor was the jury guilty of misconduct during this trial. It is to be noted that the error assigned by counsel is to testimony of corroborative nature brought out on redirect, after being opened up on cross-examination by defendants' counsel, the original testimony being introduced into evidence through cross-examination of the defense counsel of the witness Patrick. Counsel, therefore, relies upon his failure to protect the rights of his accused clients as a ground for reversal. If such rule were adopted accused defendant could hire incompetent counsel and then, after conviction, employ an abler and more diligent counsel to appeal the mistakes of his predecessor as grounds for reversal.

(B) ADMISSION OF PROOF OF ANOTHER OFFENSE RELATED TO THAT CHARGED IN THE INDICTMENT WAS PROPER.

The Reporter's Transcript discloses that the witness Jobe, on redirect examination by the Government, testified to a conversation which occurred one day after the offense charged had been committed, wherein the defendants admitted to Jobe their participation in a robbery of a person on December 5, 1947, and in which Patrick and Royal participated, Corey knocking "some old man in the head with a pistol" and that the bullet barely missed defendant Montez's head [R. 149].

In the first place, the robbery by defendants of "this old man" was similar to the offense charged in the indictment. They both involved the use of force in taking away money that belonged to another by putting both victims in fear by using a gun. Such evidence proves that the acts of the defendants in robbing the Bank of America were not innocent or mistaken, but constitute an intentional violation of the law.

The purpose was to show how some of the men would operate in a robbery (this was the robbery which was carried out and testified to by Jobe that Smith and Montez had participated in in Compton). Defendant Smith was present, parked in another car [R. 50], and defendant Montez was present and participated in the robbery [R. 56]. Patrick further testified that in the evening of the fourth (the day of the Bank of America holdup), when he was with Smith and Montez at Royal's house, that when Smith showed Patrick the Bank of America money Patrick asked Smith if he could go make some money like that. Smith replied, "Yes, you can go. You see Henry." Thereafter he saw Henry and was taken on the Compton robbery by Smith and Montez [R. 51].

These facts in themselves prove a common scheme or plan upon the part of not only Smith and Montez, but also of Royal and Patrick to unlawfully procure money by robbery at gun-point. The commission of the second robbery at Compton within 24 hours is so closely related, both in time and methods, to the robbery of the Bank of America that proof of one tends to establish proof of the other.

Both Smith and Montez attempted to establish alibis at the time of the robbery of the Bank of America, putting their identity at issue.

In the case of *Martin v. United States,* 127 F. 2d 865, at page 868, the court said:

> "This doctrine is not carried so far as to exclude evidence which has a direct tendency to prove the particular crime for which the prisoner is indicted.
>
> The exceptions, however, to this rule are few, and they are well stated in People v. Molineux, 168 N. Y. 264, 293, 61 N. E. 286, 62 L. R. A. 193, thus: 'Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.' (26 App. D. C. at 536.)
>
> The subject of the rule and its exception is helpfully discussed in People v. Molineux, 1901, cited in the quotation, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, and even more helpfully, I think, in Whiteman v. State, 1928, 119 Ohio St. 285, 164 N. E. 51, 63 A. L. R. 595."

Not only was the evidence of the other robbery properly admitted for the above purposes, but such testimony relating to the robbery of "this old man" could not have been more plain or clear and conclusive to show a course of conduct on the part of the defendants, disclosing an intentional violation of the law by positively identified persons who apparently pursued a plan of robbery to make money.

IV. Conclusion.

The evidence shows that not only was it sufficient to justify the verdict but in no way can it be said that it is as consistent with innocence as with guilt.

The evidence is so clear in support of the conviction any alleged error admitting evidence of other offenses could not possibly be prejudicial. More important, perhaps, is the clear showing that no error was committed by the trial court in the first instance in admitting proof of other offenses.

For these reasons we respectfully request that the convictions of the appellants herein be affirmed.

Respectfully submitted,

James M. Carter,
United States Attorney,

Norman W. Neukom,
Assistant U. S. Attorney,
Chief, Criminal Division,

Cameron L. Lillie,
Assistant U. S. Attorney,

Attorneys for Appellee.